STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 27, 2006
v	No. 260311 Oakland Circuit Court
LAWRENCE ROY DUCKETT, Defendant-Appellant.	LC No. 2004-198351-FC

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, and the trial court sentenced him as a third habitual offender to 10 to 25 years in prison. MCL 769.11. We affirm.

I. Facts

On August 30, 2004, defendant entered a White Castle restaurant and demanded that the cashier, Cheavon Kirk, put money from her cash register into a paper bag. Kirk testified that defendant, who was wearing a jacket, made a gesture with his right hand to his left side. According to Kirk, defendant then lifted his T-shirt and, in defendant's waistband, Kirk saw what she believed to be the handle of a revolver. Kirk testified that defendant "just lifted up enough for me to know to hurry up to put the money in the bag," and she complied with defendant's demand.

Macra Taylor, the restaurant manager, testified that she saw defendant at the cash register, but could not see his belt line. Taylor assumed that defendant had a gun when she saw his right hand in his jacket. She also testified that defendant took the right hand out of the jacket to flick or pull the right side of his jacket around his hip. Nataki Garrison testified that she could see defendant from her position behind Kirk, but did not see him do anything with his hands, though his right hand appeared to be inside his jacket. Garrison assumed that defendant might have a gun in his right hand, but she did not see a gun. Leon DeLeon testified that he saw defendant holding the paper bag with his left hand, but could not see his right hand.

At trial, defendant did not dispute that he took the money from Kirk, but claimed that he did not possess a weapon or use force. Instead, defendant maintains that he simply told Kirk to put the money in the bag. It is undisputed that, after he took the money, defendant fled from the restaurant and was apprehended by the police. The police did not find a weapon on defendant

when he was arrested, but the police recovered the bag containing some of the money. Other money apparently dropped out of the bag as defendant fled the restaurant.

II. Armed Robbery

Defendant claims that the trial court violated his due process rights when it gave an erroneous supplemental instruction on the "armed" element of armed robbery. Defendant also asserts that defense counsel was ineffective for approving the supplemental instruction.

We hold that defendant waived his specific challenge to the accuracy of the supplemental instruction when defense counsel expressly approved the instruction. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). A waiver extinguishes any error. *Carter, supra* at 216. Hence, we confine our review to defendant's claim that defense counsel's waiver constituted ineffective assistance of counsel.

Because defendant did not move for a *Ginther*[1] hearing in the trial court, our review is limited to alleged mistakes that are apparent from a review of the record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998).[2]

Defendant's ineffective assistance claim fails because he has not shown that the supplemental instruction was erroneous.[3] Before July 1, 2004, the armed element in MCL 750.529 required that the robber "be armed with a dangerous weapon, or any article used or

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] In general, a claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). As this Court explained in *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004):

> Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. *Id*. at 314; *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

[3] Jury instructions are examined as a whole to determine if they fairly presented the issues and adequately protected the defendant's rights. *People v McLaughlin*, 258 Mich App 635, 668; 672 NW2d 860 (2003). The extent of a supplemental jury instruction on the element of a charged offense is within the trial court's discretion. *People v Perry*, 114 Mich App 462, 467; 319 NW2d 559 (1982). A trial court need only give instructions specifically asked by a jury. *People v Katt*, 248 Mich App 282, 311; 639 NW2d 815 (2001).

fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon." Under this statute, a victim's mere subjective belief was insufficient to establish the "armed" element of the crime. *People v Banks*, 454 Mich 469, 474; 469; 563 NW2d 200 (1997). The statute required objective evidence of the existence of a weapon or article. *Id.*; *People v Taylor*, 245 Mich App 293; 297-298; 628 NW2d 55 (2001).

Yet, a person's use of a hand to simulate a gun could constitute sufficient objective evidence of the armed element. *Id.* at 302-303; *People v Burden*, 141 Mich App 160, 165; 366 NW2d 23 (1985). Although verbal threats may bolster visible evidence that a person was armed, *Taylor*, *supra* at 302, in *People v Parker*, 417 Mich 556, 565-566; 339 NW2d 455 (1983), our Supreme Court held that a defendant's mere verbal threat to the complainant that he would use a knife if she did not shut up, was insufficient to establish the armed element. Our Supreme Court ordered a new trial on this ground, but also found patent error in a jury instruction that provided, "[a]ll that is required is that the complainant have a reasonable belief that the defendant was armed." *Id.*

Effective July 1, 2004, the Michigan Legislature expanded MCL 750.529 by 2004 PA 128 to encompass a person who possesses "a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon." Because defendant's offense occurred on August 30, 2004, the amended statute applies. Here, however, the evidence did not reveal any oral representation by defendant that he possessed a gun. Rather, the armed robbery charge was based on Kirk's testimony that defendant lifted his T-shirt sufficiently so Kirk could see what she believed was the handle of a revolver. Kirk described the color of the handle as brown and black, and was adamant that "it looked like a revolver and I seen [sic] one before, and I know how the handle look [sic]." The prosecution later theorized in rebuttal argument that, even if the jury questioned Kirk's testimony, defendant's action of lifting his T-shirt and showing an object to Kirk led Kirk to reasonably believe that he had a weapon.

The trial court instructed the jury that the armed robbery charge required that the prosecution prove that, at the time of the assault, the defendant was armed with a weapon designed to be dangerous and capable of causing death or serious injury, and/or other object capable of causing death or serious injury that the defendant used as a weapon; and/or, any other object used or fashioned in a manner to lead a person so assaulted to reasonably believe that it was a dangerous weapon.

The trial court later made a record of its supplemental instructions in response to messages from the jury:

The second message I received reads as follows:

"Question: For armed robbery, is it required that an object must be proven to exist which the witness believes she saw, or is it enough that the witness believes that she saw an object, i.e., is it important that, in fact, she saw an object?

Answer: Yes. She must see an object or something that she reasonably believes was an object."

Second question:

"Is pretending to have a weapon enough to establish armed robbery?

Answer: Yes. A person may reasonably believe that she saw a weapon."

We reject defendant's claim that the trial court's response to the second message was erroneous. The supplemental instruction was responsive to the jury's question and did not mislead the jury. *People v Katt*, 248 Mich App 282, 311; 639 NW2d 815 (2001). The supplemental instruction did not create a risk that defendant would be convicted on the basis of a subjective belief that defendant was armed. Because there was no instructional error, defense counsel's approval of the instructions does not amount to ineffective assistance of counsel because counsel is not required to make futile or meritless objections. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000); *Darden*, *supra* at 605.

III. Compact Disc

In his pro se supplemental brief, defendant asserts that the prosecutor engaged in misconduct by introducing evidence of a compact disc (CD) from a computerized video surveillance system in the restaurant, without playing the CD for the jury. Because defense counsel specifically informed the trial court that he had "no objection" when the prosecutor offered the CD into evidence as an exhibit, without having played it, we hold that defendant waived any error in this regard. Defense counsel also approved the trial court's supplemental instruction informing the jury, "[W]e do not have the equipment necessary to permit the view." Defense counsel's express approval extinguished any error. *Carter*, *supra* at 216; *Lueth*, *supra* at 688.

Defendant also claims that defense counsel's failure to object at trial constitutes ineffective assistance of counsel. As a threshold matter, there is no record support for defendant's claim that the prosecution's introduction of the CD, without playing it for the jury, shifted the burden of proof. The prosecution did not suggest that defendant had to prove anything. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). Rather, the prosecution presented testimony that a White Castle employee prepared the CD and printed still photographs from a computerized video surveillance system for the Ferndale Police Department.

Officer Patrick Lemke testified that he viewed the CD on a computer at the restaurant where the robbery took place, but had difficulty making the CD work since that time. Without objection, Officer Lemke described the contents of the CD. He indicated that the CD showed movement from defendant's right hand toward the left side of his body, but did not give any testimony suggesting that the CD depicted a gun. Based on what he saw on the CD, Officer Lemke indicated that the still photographs appeared authentic. On redirect examination, the prosecutor also showed Kirk still photographs, and she specifically identified one photograph as depicting defendant reaching into his jacket in front of the counter during the robbery. Defendant was shown this same still photograph on cross-examination by the prosecutor and conceded that he appeared to be reaching under his jacket.

Examining this evidence in the context of the trial court's supplemental instruction to the jury that there was no equipment on which to view the CD, we find no record support for

defendant's position that the burden of proof was shifted to him to show that the CD was not inculpatory. Further, the trial court instructed the jury that "defendant is not required to prove his innocence or to do anything." Jurors are generally presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Accordingly, for defendant's claim of ineffective assistance of counsel to succeed, defendant had to establish that defense counsel's failure to take action to have the CD viewed by the jury deprived defendant of a substantial defense, and defendant failed to do so. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Affirmed.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens